No. 389.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1953.

FRANK WALTERS and EDWARD WILLIAMS, JR.,
Appellants,

vs.

THE CITY OF ST. LOUIS, JOSEPH M. DARST, Mayor,
and DEL L. BANNISTER, Collector,
Appellees.

REPLY BRIEF FOR APPELLANTS.

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REPLY BRIEF FOR APPELLANTS.

A. **The Classification Taxing Gross Earnings to Wage Earners and Net Profits to Others Cannot Be Justified on Grounds of Administrative Convenience.**

Appellees in their brief do not deny that the statutory definition of "net profits" in Ordinance 46222 contemplates that federal income taxes shall be deductible as a necessary expense of operation by the self-employed independent contractor in particular and the class of non-wage earners generally. On the one hand, they contend that

because there has been no prior adjudication of such deductibility, they should not be visited with the sins of the plain wording of Ordinance 46222 and the legislative intent evidenced by Regulation 2; on the other hand, they take the position that the classification is not arbitrary despite the fact that the Ordinance permits the class of non-wage earners to deduct federal income taxes as a necessary expense of operation. Appellees concede the fundamental difference between Ordinance 46222 and those ordinances considered in **Dole v. City of Philadelphia**, 337 Pa. 375, 11 A. 2d 163, and **City of Louisville v. Sebree**, 308 Ky. 420, 214 S. W. 2d 248, where such a deduction was specifically prohibited by the terms of the ordinances involved. They reiterate the conceded differences between wage earners and self-employed persons, but fail to show how these differences are related to the object of the taxing ordinance. They seek to justify the classification in Ordinance 46222 primarily on principles of administrative convenience, relying on **Carmichael v. Southern Coal and Coke Company**, 301 U. S. 495. In the **Carmichael** case, this Court held that considerations of administrative convenience would justify differences between the treatment of small taxpayers and that meted out to others. The object of the taxing statute was the raising of sufficient revenue to set up a comprehensive scheme for providing unemployment benefits for workers employed within the state. Having accepted the basic premise that the difference in treatment was between the small taxpayers and other taxpayers, this Court found, in effect, that the difference in treatment accorded the small taxpayer had some fair relation to the object of the taxing statute in that the expense and inconvenience of collecting the tax from small employers could well have been (in the legislature's opinion) so disproportionate to the revenue obtained as to make it economically not feasible considering the financial requirements of the unemployment benefits fund.

In the instant case, conceding that there is no substantial difference between raising revenue to meet the financial requirements of the City of St. Louis and to meet the requirements of a state unemployment benefits fund, still appellants contend that the fallacy in appellees' reliance on the **Carmichael** case is their basic premise that all wage earners and commission earners, like the employers exempt from the Alabama unemployment tax, are small taxpayers and that the expense of auditing their returns and perhaps mailing refunds in certain cases is so related to the object of the tax—in a disproportionate way, of course—as to make the taxing of wage earners and commission earners (and the revenue realized) economically unsound. Such a premise and assumption is not only unproven, but false and unreasonable; common knowledge and experience dictate that the term wage earner does not necessarily connote small income. The incomes of wage earners and commission earners, like corporations, partnerships, and self-employed persons, range from the very large to the bare subsistence; many taxpayers in the wage earner class will earn income far in excess of their self-employed counterparts. To give the **Carmichael** case the interpretation urged by appellees would open the door to justify any classification on grounds of administrative convenience. In that case the smallness of the taxpayer is apparent, but is is submitted that the **Carmichael** decision is not authority for the proposition that any classification is reasonable where it can be demonstrated that it makes collection of the tax from one class cheaper or less trouble. The caveat of the earlier cases is important; that the difference in treatment has some fair relation to the object of the tax. If the revenue would be so small from a particular class as not to justify its collection economically, then difference of treatment for purposes of administrative convenience is fairly related to the object of the tax, because sameness of treatment would undermine

the statute's purpose; but absent a reasonable basic assumption of smallness, the **Carmichael** case is not applicable. In any event, that case applies considerations of administrative convenience and expense only to explain exemption of the small class of taxpayers, not to justify the imposition of a heavier tax burden upon that class.

Appellants have suggested in their brief that administrative convenience cannot be accepted as the answer to every tax inequity; on the other hand, they have conceded that absolute mathematical equality is not necessary in taxation. In between lies the "practical equivalent" suggested in appellants' brief. Such a practical equivalent has been adopted in the federal income tax law and in the Missouri state income tax law in the form of the well-known standard deduction. This recognizes that there are many expenses necessary to the wage earner's income; it gives him in the standard deduction some rough approximation to the self-employed person's ordinary and necessary business expenses. It permits him to itemize his deductions if he chooses; for the small taxpayer's return whose auditing might be administratively and economically unsound a simple percentage deduction is allowed. No one believes that it achieves exact equality between taxpayers or that it must. It is just as available to appellees who under the guise of administrative convenience seek to justify an absolute denial of such expenses to one class of taxpayer. Furthermore, it is clear from a reading of R. S. Mo. 1949, Section 92.140 (which was the enabling act making Ordinance 46222 possible), that the General Assembly of Missouri contemplated the real possibility of some provision for deductions by employees when it enacted a section commencing "The municipal assembly of any such city may provide for deductions and exemptions from salaries, wages and commissions of employees . . ." It is because the enabling act itself does not deny wage earners as appellants the deductions granted non-wage earners, but pro-

vides the machinery for such equal treatment that appellants have confined their attack in their Specification of Errors to Ordinance 46222 and do not now claim the enabling act is violative of the Fourteenth Amendment.

B. **The Classification in Ordinance 46222 Permitting Deduction of Income Taxes to Non-Wage Earners and Disallowing Same to Wage Earners Discriminates Between Classes Which Compete With Each Other.**

In considering appellants' claim of arbitrary classification in the Ordinance qua Ordinance because of the deductibility of federal income taxes by the self-employed person, the appellees argue that there must be a prior construction to this effect by a Missouri Court to determine what constitutes a "necessary expense of operation." While appellants can readily understand their doubt as to the meaning of this terminology which the Supreme Court of Missouri termed "vexing" (R. 61), it seems that the words themselves constitute at the least an ascertainable standard which has been implemented by the Collector's Regulation 2, a true copy of which is in evidence (R. 22, 23). Whatever vagueness and indefiniteness are attributable to the phrase "necessary expenses of operation" have been removed by the Regulations; for this reason appellants have narrowed their Specification of Errors to exclude any claim of unconstitutionality because of the vague and indefinite meaning of the Ordinance (a claim which was ruled adversely to appellants by the Supreme Court of Missouri [R. 61] and which appellees paradoxically now seem willing to concede). Although appellants are not yet willing to concede that the phrase may change "from time to time as accepted methods of accounting change" (R. 61), they confess that the issue was properly ruled against them because of the clear and explicit language of the interpretative regulations supplementing the words of the Ordinance. Whatever else its fault, vagueness and in-

definiteness are not attributed to the meaning of "necessary expenses of operation" in Ordinance 46222; appellants are unaware of any statute or rule of law which would first require a judicial construction of an ordinance as a condition precedent to attacking its constitutionality on federal equal protection grounds.

Appellees, however, make no serious claim in their argument that Ordinance 46222 does not contemplate the deduction of federal and local income taxes by self-employed persons, partnerships and corporations. The Ordinance and Regulations provide that the taxpayer in the non-wage earner class shall be taxed upon the business enterprise as an entity (R. 26, 27). In this way all who report on "net profits" are treated alike and this is granted by appellees (Appellees' Brief, p. 25); viewing the partnership as an entity made liable for the earnings tax and the self-proprietor as a separate business entity similarly made liable by Ordinance 46222, appellees must also contemplate that the very earnings tax in question shall be deductible as a "necessary expense of operation" in addition to federal and local income taxes. They explain, however, the deductibility of such taxes on grounds of public policy; they urge that the Ordinance attempts to ameliorate the burden of its tax so as to lessen the competitive disadvantage of the non-wage earner taxpayer with its competitors not subject to the same burden. Appellees view competition on purely horizontal levels; since they find that self-employed persons, partnerships and corporations compete only with each other and not with wage earners (who compete only with each other on some totally different level or stratum), they see no discrimination against the wage earner taxpayer in allowing such deductions.

And it is upon this same narrow ground that appellees have distinguished the case of **Quaker City Cab Company v. Commonwealth of Pennsylvania**, 277 U. S. 389. They

argue that case is inapplicable because there is no competition here between the classes of taxpayers as defined; they approve the holding of the **Quaker City Cab** case, but insist it is applicable only as between classes who compete with each other. Their point is that wage earners do not compete with business entities, but only with each other for jobs. Such a distinction is unrealistic. Appellants submit that the competitive disadvantage is as present to the class discriminated against in the instant case as it was to the Quaker City Cab Company. Wage earners in any given line of endeavor compete with those who are offering the same services or goods as self-proprietors, partnerships, or corporations. For instance, Shapleigh Hardware in the instant case incurs certain items of expense in its truck hauling operations which are now being handled by employees as appellants. If independent contractors, partnerships or corporations are granted tax advantages which will enable them to handle Shapleigh's hauling operations on a cheaper basis than the present employee operation, it can readily be expected that Shapleigh will choose to have them do its hauling and appellants' jobs will be affected. Shapleigh will either give them the opportunity to meet the competition by taking less salary or will do away with their jobs altogether. It would then be no answer to the wage earner's dilemma to suggest that he, too, become an independent contractor, partnership, or corporation, and likewise avail himself of these tax benefits. Lack of capital may prevent the change; there are many independent factors which would imperil any attempted adjustment to a new status. Any attempted shift could work serious hardship on the wage earner. The purpose of the Ordinance is not to regulate so as to encourage wage earners in St. Louis to become entrepreneurs. Similarly, it would be no answer to the wage earner who has lost his job at Shapleigh Hardware to advise him that he may now shift to an employee status

as a truck driver with the business entity which displaced him competitively. If the demand in St. Louis for truck drivers is less than the supply, he may be one of those who finds there is no room in the occupation for him, whereas before his job was secure and it was others whose entry into the field created the excess of supply.

C. **The Discriminatory Administration of the Ordinance Against Appellants Is Supported by the Record.**

Appellees rely heavily on the opinion by the Supreme Court of Missouri to the effect that the problem of administrative enforcement was not properly before it; they contend that such a holding should foreclose this Court's review of the discriminatory operation of the Ordinance. No useful purpose could be accomplished by re-stating the reasons for appellants' position to the contrary; they have already been set out in appellants' original brief. This Court will read the pleadings and evidence and decide for itself whether the problem is fairly presented and whether this Court is bound by the adjudication of the Supreme Court of Missouri. It is significant, however, that appellees nowhere deny that the copy of the Regulations in the record is a true and accurate one (R. 21-31). They do not claim that the Regulations have ever been revoked or amended, yet they accuse appellants of a serious inaccuracy in stating that it is under this Ordinance and Regulations that appellees claim the funds withheld by Shapleigh Hardware from the wages of appellants. They assert that the funds are not claimed under the Regulations, but only under the city ordinance and enabling act. Of what effect and purpose the Regulations are appellees seem to disclaim all knowledge. The statement complained of is amply justified by the record. Appellee Del L. Bannister is Collector and in charge of the collection of the tax levied in Ordinance 46222 (R. 16). He was empowered to issue certain Regulations pertaining to the col-

lection and enforcement of said tax (R. 16, 39). Shapleigh Hardware Company has withheld certain amounts from the wages of appellants as their employer (R. 16). Employers are required to withhold their employees' tax (R. 38). A return is required to be filed with the Collector by every employer withholding (R. 38); this return is subject to the rules and regulations prescribed by the Collector (R. 38). The Collector has in fact issued such Regulations (R. 21-31).

Conclusion.

For the foregoing reasons appellants submit that Ordinance 46222 of the City of St. Louis violates the equal protection clause of the Fourteenth Amendment.

Respectfully submitted,

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